altogether and put the bankrupt in the same position as if there had been no adjudication order (*per* Stirling L.J. in *In re Keet*[1]).

It is common ground that our Bankruptcy Act 1967 is modelled along the English Bankruptcy Act 1914 and the phrase in the second limb of section 105(1) of our Act is in identical terms with the words in the second limb of section 29(1) of the Act 1914. The meaning of these words "where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full" was considered by the English Court of Appeal in the case of *In re Keet.* Although the decision was based on section 35 of the English Bankruptcy Act 1883 it is not disputed that the section corresponded to section 29(1) of the 1914 Act. In *re Keet (supra)* it was held that to satisfy the section the "debts" – including at least all debts which have been actually and properly proved in the bankruptcy – must have been fully paid in cash, and that the second limb is not satisfied by an unconditional release given to the bankrupt by his creditors. *Keet's case* was followed some fifty-seven years later by Cross J. in *More* v. *More.*[2] We have no doubt as to the soundness of this interpretation. In construing the provisions of the Bankruptcy Act 1967 it has to be borne in mind the observations of Fry L.J. in *In re Hester*[3] at page 641:

"I conceive that one of the objects of this statute was, if not to put an end to, yet at least to discourage, private arrangements between a debtor and his creditors. Anyone who knows the history of the law of debtor and creditor of this country, knows that private arrangements between debtors and their creditors have often been scandalous, and that they have given opportunities for misrepresentation, for private bargains, and for undue preferences. I for one should pause long before I allowed the evils of private arrangements between a debtor and his creditors to creep into the administration of this Act ..."

We would adopt every word which has fallen from the lips of the learned Lord Justice.

It appears to us that the case of *In re Keet* (*supra*) and *More* v. *More* (*supra*) had not been cited to the Court below and if the attention of the learned Judge had been drawn to these two authorities he might not have exercised the discretion and made an Order as prayed. On the affidavit evidence adduced before the learned Judge, in our opinion, the bankrupt had failed to satisfy that the proved debt lawfully due to the appellant had been paid in full in cash. For these reasons we allow the appeal of the appellant and set aside the order of the learned Judge in annulling the adjudication order. The appellant is clearly entitled to its costs here and in the Court below. The deposit to be refunded to the appellant.

Appeal allowed.

Solicitors : *Nik Hussain, Ibrahim & Abdullah, Atma Singh Veriah & Co.*

PUBLIC PROSECUTOR v. BALDEV SINGH

[A.Cr.J. (Zakaria Yatim J.) February 27, 1985]

[Penang – Criminal Appeal No 3 of 1984]

Criminal Law and Procedure – Charges of cheating and criminal breach of trust – Acquittal on first charge without calling on defence – Acquittal after hearing defence on second charge – Appeal – Burden on prosecution and on defence.

In this case the respondent, an advocate and solicitor, was charged with two charges alleging (a) that he cheated an insurance company by dishonestly inducing them to pay him $3,500 in respect of an accident claim made by one Mohamad Salleh by falsely representing that Mohamad Salleh was alive when the respondent knew that he was already dead; (b) that the respondent being an agent of the said Mohamad Salleh and entrusted with a sum of $3,500 committed criminal breach of trust in respect of part of the money. At the close of the case for the prosecution, the learned President of the Sessions Court found, in respect of the first charge, that the prosecution had failed to make out a *prima facie* case against the respondent, who was accordingly acquitted and discharged. With regard to the second charge, the learned President called on the respondent to enter on his defence. After hearing the respondent's evidence on oath and the evidence of his witness, the learned President was satisfied with the defence explanation. He found the respondent not guilty of the charge and acquitted and discharged him. The Public Prosecutor appealed.

Held: (1) what the trial court has to decide at the end of the prosecution case is a question of law only. But in arriving at a conclusion the trial court has to examine the evidence before it. If the evidence is inherently incredible or if the prosecution has failed to prove one or more of the ingredients of the charge the trial court is justified in not calling upon the accused to enter on his defence;

(2) in this case the learned President found that the evidence adduced by the prosecution on the first charge was inherently incredible and he found that the ingredients of the charge had not been proved. He was therefore fully justified in acquitting the respondent in respect of the first charge without calling his defence;

(3) in regard to the second charge the learned President was satisfied with the defence explanation. The learned President had evaluated the evidence of the defence carefully and there was no misdirection in this case. The learned President had come to the right decision in accepting the defence explanation and acquitting the respondent.

Cases referred to:

(1) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(2) *Ragunathan* v. *Pendakwa Raya* [1982]1 M.L.J. 139.
(3) *Public Prosecutor* v. *Abang Abdul Rahman* [1982]1 M.L.J. 346, 349.
(4) *Lim Kheak Teong* v. *Public Prosecutor* [1985]1 M.L.J. 38.
(5) *Rajoo* v. *Rex* [1949] M.L.J. 250.

CRIMINAL APPEAL.

T.S. Sambanthamurthi (Deputy Public Prosecutor) for the appellant.

Karpal Singh (*Lim Ewe Hock* with him) for the respondent.

Cur. Adv. Vult.

Zakaria Yatim J. : The respondent was at the material time a practising advocate and solicitor in the office of Messrs. Tripital Singh and Company, Penang.

On March 28, 1975 he was charged in the Sessions Court, Penang with two charges – one was for cheating and the other for criminal breach of trust. With regard to cheating, it was alleged in the charge that the respondent cheated the Pacific and Orient Underwriters Sdn. Bhd. by dishonestly inducing them to pay him $3,500.00 in respect of an accident claim made by one Mohamad Salleh bin Abdul Rahman, by falsely representing that Mohamad Salleh was alive when the respondent knew that he was already dead. With regard to the other charge, it was alleged that the respondent, being an agent of the said Mohamed Salleh who entrusted him with a sum of $3,500.00, committed criminal breach of trust in respect of part of the money namely $2,100.00.

At the close of the case for the prosecution, the learned President found that in respect of the first charge, the prosecution had failed to make out a *prima facie* case against the respondent, who was accordingly acquitted and discharged. With regard to the charge on criminal breach of trust, the learned President called upon the respondent to enter his defence. After hearing the respondent's evidence of his witnesses, the learned President was satisfied with the defence explanation. He found the respondent not guilty of the charge and acquitted and discharged him.

The learned DPP now appeals against the Order of Acquittal and Discharge in respect of both the charges.

During the hearing of this appeal, the learned DPP made a very lengthy submission in which he said the learned President had misdirected himself on the question of facts. He went into the record of the trial in great detail and submitted that the President had reached the wrong conclusion in respect of the oral evidence as well as the documentary evidence.

The learned DPP submitted that the President was wrong in not calling for the defence in respect of the first charge. According to him, at the end of the case for the prosecution, what the President had to decide was a question of law whether the defence should be called or not. In support of his submission, the learned DPP relied on the Privy Council decision in *Haw Tua Tau* v. *Public Prosecutor.*(1) This decision was in respect of an appeal from the Singapore Court of Appeal but the Federal Court in *Ragunathan* v. *Pendakwa Raya*(2) held that the principle laid down by the Privy Council in the *Haw Tua Tau* case (*supra*), applies in this country. The relevant part of the Privy Council decision is as follows:-

> "At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding "that no case against the accused has been made out which if unrebutted would warrant his conviction", within the meaning of section 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance."

It is clear from the judgment of the Privy Council that what the trial Court has to decide at the end of the prosecution case remains a question of law only. But in arriving at a conclusion, the trial Court has to examine the evidence before him. If the evidence is inherently incredible or if the prosecution fail to prove one or more of the ingredients of the charge the trial Court is justified in not calling upon the accused to enter his defence.

In the present case, I have read the judgment of

the learned President and I think he had carefully evaluated all the material evidence before him and drew his own conclusion. He discussed at some length the evidence of the key witnesses of the prosecution in particular, the evidence of PW7, PW8 and PW9. The learned President said, "Their evidence revolves around two vital questions: (1) the identity of the recipient of the information of the death of Mohamed Salleh and (2) the knowledge (or the lack of it) of the accused." His evaluation of the evidence of the three witnesses is as follows:—

"The witnesses not only contradict each other they also contradict themselves. They say one thing in one breath and something entirely different in the next and the same process is repeated over and over again, with each of the three witnesses. It is impossible to ascertain which of the version is the correct one."

After considering the whole evidence, the learned President made the following findings:-

"The first question the Court has to ask itself is whether or not (from the evidence adduced) the accused knew that Mohd. Salleh had died when he made the representation contained in P9. The evidence adduced on this point by PW7, PW8 and PW9 is absolutely chaotic, confusing, unreliable and totally irreconcilable. . .The letter P9 is another indication that the accused was not aware that Mohd. Salleh had died ... This evidence to my mind excludes the evidence of a dishonest intention which is an essential ingredient in a cheating charge. . .In the circumstances I hold that the first ingredient has not been proved."

From the findings of the President, it is clear that he had found that the evidence adduced by the Prosecution was inherently incredible. More significant still he had found that the ingredient of the first charge had not been proved by the Prosecution. In my opinion, the President was fully justified in acquitting the respondent in respect of the first charge without calling his defence.

The learned DPP urged the Court to interfere with the finding of fact made by the learned President on the ground that such finding was wrong. It is true that on matters of fact this court, sitting as an appellate court, can interfere in appropriate cases. But before doing so the appellate court should give proper weight and consideration to the views of the trial judge as to the credibility of the witnesses. Furthermore, an appellate court should be slow in disturbing a finding of fact arrived at by the judge who had the advantage of seeing the witnesses. See *Public Prosecutor* v. *Abang Abdul Rahman.*[3] In the instant case I am satisfied the learned President had made a proper finding on the facts and I do not intend to interfere with such finding.

I shall now turn to the second charge. As already stated, the learned President was satisfied with the defence explanation and accordingly acquitted and discharged the respondent. In his grounds of judgement, he made the following findings:-

"In the circumstances the defence version is accepted. Where there is a doubt, the matter must always be resolved in favour of the accused. . .The accused may well have been guilty of some breach of duty or discipline under the Solicitors Ordinance but he certainly is not guilty of the offence with which he is charged. . .All in all I feel that under the circumstances the accused has given a reasonable explanation which is consistent with innocence and he is therefore entitled to an acquittal."

In my view the learned President had evaluated the evidence of the defence carefully and I do not think there is any misdirection in this case. In considering the defence case, it is relevant to refer to the case of *Lim Kheak Teong* v. *Public Prosecutor.*[4] In the case the applicant was charged in the Sessions Court, Kuala Lumpur on two counts under section 4(c) of the Prevention of Corruption Act 1961. At the close of the case for the prosecution the President called for the defence in respect of both charges. In this judgment, the President stated that after considering the evidence and after observing the demeanour of the applicant he found that the applicant was giving an explanation consistent with his innocence. He accepted the explanation of the applicant. He also found the applicant had raised a reasonable doubt on the prosecution's case. On appeal to the High Court, the learned Judge substituted a conviction for the acquittal in respect of both charges. Following this decision the applicant asked the Federal Court to make a ruling on the following question:-

"In an appeal against acquittal from the decision of a Subordinate Court to the High Court raising only questions of fact, where there is evidence to support the defence and there has been no misdirection by the Subordinate Court can the High Court substitute its own finding for that of the Subordinate Court?"

The Federal Court, after considering the various authorities, answered the question in the negative. In view of the decision of the Federal Court, I find that the learned President had come to the right decision when he accepted the defence explanation. I should mention here that when an accused person is called upon to make his defence, the burden upon him is not the same as that of the

prosecution. On the other hand, from the beginning of the case until the end, the burden remains upon the prosecution to prove the guilt of the accused. *Rajoo* v. *Rex.*[5] In the present case the prosecution had failed to discharge the burden to the end.

For the reasons stated above, the appeal is dismissed.

Appeal dismissed.

Solicitors : *Karpal Singh & Co.*

DATIN PEGGY LILIAN TAYLOR v. LEONG YUET YENG & ANOR.

[O.C.J. (Siti Norma Yaakob J.) March 28, 1985]

[Kuala Lumpur – Civil Suit No. P.62 of 1983]

Probate and Administration – Letters of Administration granted to plaintiff – Whether schedule of assets should identify debt as asset of estate to enable plaintiff to claim debt against defendants.

The plaintiff, administratrix of the estate of her husband, Eric Taylor, deceased, sought to recover $65,625.00 being debt due from the defendants as the administratrix and administrators of the estate of Lim Chooi Seng, deceased.

The plaintiff entered judgments against the first and second defendants on September 13, 1984, but not against the third defendant as he was no longer one of the administrators. On November 20, 1984, she had filed a notice of discontinuance of this action against him.

In an application to have the writ of summons and statement of claim as well as the default judgment entered against the first and second defendants set aside, the latter admitted that they had all along been willing and ready to make payment of the sum claimed provided the plaintiff produce the full grant of Letters of Administration with the schedule of assets identifying the debt as an asset of the estate and the certificate from the Collector that estate duty had either been paid or payment of it postponed so that the plaintiff can give a valid receipt for the debt. As the plaintiff had failed to do so despite several demands being made to that effect, she had no capacity to sue the defendants and therefore the writ of summons and the proceedings that ensued were a nullity. The facts revealed that the plaintiff had sent the grant of Letters of Administration to the defendants but they refused to accept it as the debt claimed did not form part of the assets of the deceased. Subsequently, the plaintiff had, prior to the filing of the present action, filed a corrective affidavit with the Collector of Estate Duty disclosing the debt as another item of asset. The defendants, however, claimed that the production of such a Certificate at the later stage was not good enough as it should have been done before this action was filed.

Held, dismissing the defendants' application: as the grant itself gives the plaintiff the necessary powers to administer the estate, it is immaterial that the schedule did not identify the debt as an item of asset as it is merely evidence as to whether estate duty is payable or not payable by the estate. Thus at the time when the writ was filed, the plaintiff had the necessary capacity to sue and she could give a valid receipt for the debts.

Cases referred to

(1) *Chia Teck Liang* v. *Tan Soo Khiang* [1936] M.L.J. 185.

(2) *Comptroller of Income Tax* v. *Yan Tai Min* [1965] 1 M.L.J. 255.

(3) *P. Govindasamy Pillay & Sons Ltd.* v. *Lok Seng Chai & Ors.* [1961] M.L.J. 89.

CIVIL SUIT.

Ms Theresa Chong Siew Lin for the defendants/applicants.

G. Krishnan for the plaintiff/respondent.

Cur. Adv. Vult.

Siti Norma Yaakob J. : The plaintiff in this action is the administratrix of the estate of her husband, Eric Taylor, deceased, and she brings this action to recover $65,625.00 being a debt due from the defendants as the administratrix and administrators of the estate of Lim Chooi Seng, deceased. Service of the writ of summons and statement of claim was effected on all three defendants by way of substituted service and when they failed to appear, the plaintiff entered judgments against the first and second defendants on September 13, 1984, but not against the third defendant as she had already been informed on February 20, 1983 that he was no longer one of the administrators and on November 20, 1984, she had filed a notice of discontinuance of this action against him.

However, before the filing of the notice of discontinuance, all three defendants had on October 16, 1984, filed an application to have the writ of summons and statement of claim as well as the default judgment entered against the first defendant set aside. In a supplementary affidavit filed by their solicitors, the defendants also seek to have the judgment in default entered against the second defendant set aside and despite objections raised, I had read into the defendants' application another prayer that the default judgment entered against the second defendant be also set aside as the circumstances surrounding the entries of these two default judgments were similar and that the solicitors for the defendants were only aware after the filing of their application that judgment in default